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THE ENFORCEMENT OF LABOR ARBITRATION AGREEMENTS

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A COMPARATIVE study of labor developments in the United States and in some of the civil law countries strikingly illustrates the degree to which the collective bargaining agreement remains an unassimilated phenomenon in the structure of American law.¹ This does not mean that American legislators, judges and scholars have not considered the problem at length,² for they recognize the tremendous importance of the collective bargaining agreement as an almost singular instance of private "legislation," so to speak, controlling some of the most important relationships in our society. But it does suggest that whatever legal efforts we have expended have been directed primarily at the *making* of collective agreements. Thus, the Norris-LaGuardia Act greatly broadened the base of collective bargaining by unleashing the economic strength of organized labor; and the Wagner Act resulted in tremendous developments—far beyond the liking of a later Congress, as the Taft-Hartley Act has shown. But while both these statutes exhibit great concern for the *making* of collective agreements, precious little has been done in our law to insure their enforceability.

This state of imbalance may perhaps be explained by the fact that a laissez-faire minded legal system preferred to leave the enforcement of this novel "contract" to the parties themselves. Moreover, there never has

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¹ See Schmidt and Heineman, *Enforcement of Collective Bargaining Agreements in Swedish Law*, 14 *Univ. Chi. L. Rev.* 184 (1947); and cf. Weisberg, *The Transformation of the Collective Agreement in Soviet Law*, 16 *Univ. Chi. L. Rev.* 444 (1949).

² See Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 *Mich. L. Rev.* 1109 (1941); Rice, *Collective Labor Agreements in American Law*, 44 *Harv. L. Rev.* 572 (1931); Fuchs, *Collective Labor Agreements in American Law*, 10 *St. Louis L. Rev.* 1 (1924).

been as much political pressure on our courts and legislatures to provide for the enforcement of collective agreements as there has been toward the making and the acceptance of them in the first instance. To be sure, many of our courts have developed techniques of enforcing labor agreements during the last fifteen or twenty years. While this experience has shown that the enforcement of certain provisions may be accomplished through the use of judicial process (i.e., damage suits against unions for breach of contract and other issues connected with breaches of no-strike clauses, as well as suits by unions to enforce compliance with union security provisions), it has also indicated that employers and unions are not willing to put up with the expense and to take the time that litigation requires in settling more routine disputes. Hence, while certain aspects of enforcement are left to the courts, the handling of grievances arising under collective agreements has largely been taken over by private arbitration, in accordance with provisions to that effect in the agreements. Furthermore, employers and unions have tended to submit to arbitration many of their disputes not arising under formal contracts. Just as the medieval merchants found it expedient to set up their own tribunals or *pie powder* courts³ in the great markets of early England, so employers and the unions representing their employees have more and more come to utilize arbitration as a private, informal and extra-judicial method of settling their differences. The parties to the great majority of collective agreements⁴ will nowadays include provisions committing themselves to arbitrate such differences as may thereafter arise between them concerning the interpretation and application of such agreements. These commitments in advance to arbitrate future differences reveal a civilized trend. Unfortunately, however, in keeping with a traditional attitude, the courts will not enforce provisions to arbitrate, even where they are now willing to enforce the more conventional terms of collective agreements as a whole.⁵ This refusal would be illustrative of little more than

³ So called because justice was administered as speedily as the dust falls from the foot—hence, *piéd poudre*. For a discussion of these early courts see Wolaver, Historical Background of Arbitration, 83 U. of Pa. L. Rev. 132, 136 et seq. (1934).

⁴ It is estimated that three out of four collective bargaining agreements negotiated today provide for arbitration as the terminal point of disputes arising under the contract. Bureau of Labor Statistics, 59 Monthly Lab. Rev. 1001 (1944); see Studies in Personnel Policy, No. 71, at 11 (Nat'l Ind. Conf. Board, 1946).

⁵ This is the majority rule. See for example, *Leveranz v. Cleveland Home Brewing Co.*, 24 N.P.(N.S.) 193 (Ohio, 1922), enforcing a collective bargaining agreement, and *Utility Workers Union v. Ohio Power Co.*, 36 Oh. Ops. 324, 77 N.E. 2d 629 (1947), refusing to enforce an arbitration clause appearing in a collective agreement. While collective agreements are now enforced almost everywhere, in no more than ten states will the arbitration clause appearing therein be enforced. See p. 241 infra.

the normal judicial lag were it not for the rapid modern developments of labor-management arbitration. As it is, the gap is an alarmingly wide one.

Happily, most employers and unions regard the arbitration agreement as an "article of faith." In the overwhelming number of instances, the parties have honored their agreements to arbitrate. It is seldom that a court is called upon to enforce a labor arbitration award; and only slightly more often have the courts been asked to enforce undertakings to arbitrate in collective labor agreements. Thus, the number of contracts honored greatly exceeds the number broken. But it cannot be reasonably expected that contractual commitments which may be broken with impunity will very long continue to be rigorously observed. And in view of the greatly increased use of arbitration, largely due to the impetus furnished by wartime measures encouraging the peaceful settlement of industrial disputes,⁶ the extent to which these promises will be broken is bound to increase. Such breaches of good faith are likely to imperil the whole arbitral process. As more and more awards and agreements to arbitrate are ignored with impunity, the more arbitration will become just another way-station to, rather than a rescue-station from, industrial conflict. In an area where the peaceful resolution of disputes is so important, this trend could have tragic results. A re-examination of the legal nature of the labor-management agreement to arbitrate therefore seems imperative.

I. THE COMMON LAW

The common-law doctrine that agreements to arbitrate are revocable at the will of either party has been attributed to an early judicial antipathy to tribunals "competing" with the courts themselves. Lord Coke, while compelling the forfeiture of a penal bond that had been put up to guarantee the performance of an agreement to arbitrate—such performance having been neglected—off-handedly remarked that such agreements were revocable because "my act or my words cannot alter my judgment of the law to make *that* irrevocable which is of its own nature revocable."⁷ Because of Coke's great prestige, this notion quickly be-

⁶ In 1942 the National Labor Relations Board was vested with the authority to decide labor disputes, Exec. Order, 7 Fed. Reg. 237 (1942), following the "no-strike, no-lockout" edict of December, 1941. The Board was to assume jurisdiction and finally to determine the dispute through "mediation, voluntary arbitration, or arbitration under rules provided by the Board." For an account of the Board's wartime arbitration activities see Freidlin and Ulman, *Arbitration and the National War Labor Board*, 58 Harv. L. Rev. 309 (1945).

⁷ *Vynior's Case*, 4 Co. Rep. 302, 305 (K.B., 1609). There is a dispute as to Coke's accuracy in summing up the common law. Coke was right: Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595 (1928). Coke was wrong: Cohen, *Commercial Arbitration and the Law* 84-93 (1918).

came established and has flourished over three hundred and fifty years. No one has ever adequately explained just what there is in the "nature" of an agreement to arbitrate that makes it inherently revocable. Any attempted explanation is rendered even more difficult by the fact that courts will, generally, enforce the award when an arbitration has been completed,⁸ and, where it has not, will make a noncomplying party pay over any agreed forfeiture for not having lived up to his agreement.⁹ Further, an action at law for breach of an agreement will be entertained and nominal damages awarded.¹⁰ Thus, for the payment of a nominal sum one need not respect his otherwise valid obligation!¹¹

Ever since the middle of the nineteenth century, lawyers have been puzzled over the unenforcibility of agreements to arbitrate. Lord Campbell advanced the theory that the revocability doctrine "had its origin in the interests of the judges."¹² It seems that the income received by seventeenth- and eighteenth-century English judges consisted mainly of fees received from the cases they heard. Perhaps for that reason judges naturally looked upon arbitrations as devices which "ousted their jurisdiction."¹³ Thirty-five years ago Judge Hough observed: "No reason for the simple statement that arbitration agreements are against public policy has ever been advanced, except that it must be against such policy to oust the courts of jurisdiction."¹⁴ Yet waivers, covenants not to sue, and consent decrees—all "ousters" of a sort—have been given judicial blessing. "It is," as Judge Hough remarked,¹⁵ "surely a singular view of juridical sanctity which reasons that, because the Legislature has made a court, therefore everybody must go to the court."

Nevertheless, the more judges criticized the doctrine of revocability,

⁸ *Rueda v. Union Pac. R. Co.*, 180 Ore. 133, 175 P. 2d 778 (1946). See 6 Williston § 1927 n. 2 (rev. ed. 1938) for a collection of cases. The reason has been given that an award at common law will be enforced because it is the agreement of the parties. *Jenifer v. Comm'rs*, 13 D. Repr. 189, 2 Disney 189 (Cinn. Superior Court Rep., 1858). Why the award represents an agreement while the submission itself does not is extremely difficult to explain.

⁹ *Sturges, Commercial Arbitrations and Awards* § 298 (1930).

¹⁰ See Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595, at 606 (1928).

¹¹ It is readily apparent that Holmes' "right to break a contract" is a flourishing notion in the law of arbitration. The Restatement adopts this view. Rest., Contracts § 550 (1932).

¹² *Scott v. Avery*, 25 L.J. Ex. 308, 313 (1856).

¹³ This rationale reputedly originated in *Kill v. Hollister*, 1 Wilson 129 (K.B., 1746). For a discussion of this doctrine and associated cases see Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. of Pa. L. Rev. 132, 138 et seq. (1934).

¹⁴ *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006, 1008 (D.C.N.Y., 1915).

¹⁵ *Ibid.*, at 1009.

the more inflexibly they observed it—Judge Hough included. Judge Frank, with his usual penetrating wit, had this to say: "Perhaps the true explanation is the hypnotic power of the phrase, 'oust the jurisdiction.' Give a bad dogma a good name and its bite may become as bad as its bark."¹⁶

But the strict common-law rule has undergone some change. Lord Campbell qualified it with the doctrine that if arbitration were to be used merely to determine preliminary issues upon which liability could be based, and not as an ultimate disposition of the issue on the merits, then the agreement would be enforced.¹⁷ Moreover, wherever they have found it possible to do so, courts have distinguished between an arbitration and an "appraisement"—that is, the determination of some fact upon which the issues of liability could be formulated, as for example the amount of damages suffered, in contradistinction to the issue of liability itself "as a matter of law."¹⁸ The common-law history of commercial arbitration has been treated adequately and in detail elsewhere,¹⁹ and the great body of case law on the subject of commercial arbitration has been classified and digested in several authoritative tomes.²⁰ A rehash here would serve no purpose. But since, by and large, the rules formed to govern commercial arbitration constitute the major source of the common law which is today applied to labor arbitrations, the following concise summary of the principles of common-law arbitration, formulated by the Department of Labor, will prove useful.²¹

Common law arbitration rests upon a voluntary agreement of the parties to submit their dispute to an outsider. The submission agreement may be oral and may be revoked at any time before the rendering of the award. The tribunal, permanent or temporary, may be composed of any number of arbitrators. They must be free from bias and interest in the subject matter, and may not be related by affinity or consanguinity to either party. The arbitrators need not be sworn. Only existing disputes may be submitted to them. The parties must be given notice of hearings and are entitled

¹⁶ *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978, 984 (C.C.A. 2d, 1942).

¹⁷ *Scott v. Avery*, 25 L.J. Ex. 308 (1856). A great many of the "whittling precedents" are cited in *Matter of Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 130 N.E. 288 (1921).

¹⁸ 6 Williston, *Contracts* § 1921A (rev. ed. 1938).

¹⁹ Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. of Pa. L. Rev. 132 (1934); Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595 (1928). There are some excellent judicial essays on the subject: see Judge Frank, *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. 2d 978 (C.C.A. 2d, 1942); and Judge Peterson's dissent in *Park Construction Co. v. Independent School District*, 209 Minn. 182, 296 N.W. 475 (1941).

²⁰ Sturges, *Commercial Arbitrations and Awards* (1930); 6 Williston *Contracts* § 1918 et seq. (rev. ed. 1938).

²¹ *Labor Arbitration under State Statutes* (U.S. Dep't of Labor, 1943).

to be present when all the evidence is received. The arbitrators have no power to subpoena witnesses or records and need not conform to legal rules of hearing procedure other than to give the parties an opportunity to present all competent evidence. All arbitrators must attend the hearings, consider the evidence jointly and arrive at an award by a unanimous vote. The award may be oral, but if written, all the arbitrators must sign it. It must dispose of every substantial issue submitted to arbitration. An award may be set aside only for fraud, misconduct, gross mistake, or substantial breach of a common law rule. The only method of enforcing the common law award is to file suit upon it and the judgment thus obtained may be enforced as any other judgment.

This, then, is the judicial climate in which employers and unions have attempted to foster agreements to arbitrate their differences and disputes. The considerable statutory development in the field indicates the intolerable state of the judge-made common law which was intended to throttle a technique that society found useful. But an examination reveals that even the almost numberless arbitration statutes failed to provide adequately for the enforcement of labor-management agreements to arbitrate.

II. THE STATUTES

It is apparent that common-law arbitration is of little utility in the context of modern labor relations. First of all, if the agreement to arbitrate is revocable, it can be depended upon by nobody. Second, when an arbitral board, instead of a single arbitrator, is used in labor cases, it usually includes "interested" or partisan representatives of each side. Third, the present agreement to arbitrate disputes arising in the future, and not merely presently existing disputes—the most important item in collective labor agreement arbitration procedures—is not enforceable at common law. And finally, the whole point of arbitration is lost if the winning party has to go to court to enforce the award and the judge requires the virtual relitigation of all the issues involved. Indeed, these same criticisms generally hold true when common-law arbitration is used in the commercial world in settling issues between business men. The commercial world had long felt these inadequacies and consequently the commercial arbitration statute is of ancient vintage.²² But it was not until the late 1880's that legislative interest was first displayed in labor arbitration. Then it was recognized that employers and employees as well as business men required a procedure whereby disputes could be settled without the delay, technical irritation and expense of an inept

²² For a brief history of these statutes see Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. of Pa. L. Rev. 160, 164 et seq. (1934).

jury trial. Many of our states responded to this need with statutes providing for the enforcement of arbitration agreements.²³

The early statutes made no distinctions between commercial and industrial—or labor—arbitration. They were designed primarily to overcome the common-law disabilities in the enforcement of commercial arbitration agreements, since it was then too early to spend much thought on arbitration in the labor field. Arbitration in that field assumed importance only after collective bargaining became fairly extensive and began to reach an advanced stage of development. Certainly in the late nineteenth century neither economic conditions nor social ideology required that labor disputes be arbitrated. These statutes, however, did not satisfy even the needs of the merchants. Without exception the early statutes were confined to the enforcement of agreements to arbitrate only already existing disputes—the so-called “submission agreement.” Aside from the possible constitutional objections to enforcing agreements to arbitrate disputes arising in the future,²⁴ legislatures generally believed that it was safer to enforce only submission agreements pertaining to existing disputes.

The policy argument against enforcing “future-disputes” clauses was a variant of the “ouster of jurisdiction” rationale. The theory was advanced that if the courts were not free to intervene, they would be fostering a method which the unscrupulous might abuse—a process under which, “by first making the contract, and then declaring who should construe it, the strong could oppress the weak.”²⁵ But it is difficult to imagine why a future-disputes arbitration provision in a contract should expose

²³ The origins of labor arbitration in America are traced in Oliver, *The Arbitration of Labor Disputes*, 83 U. of Pa. L. Rev. 206, 213 et seq. (1934). See also Lapp, *Labor Arbitration* 5 (1942).

²⁴ See *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923), which declares that future-disputes clauses are void at common law in Illinois and suggests that they are prejudicial to the rights of citizens, as guaranteed by the Constitution, to resort to the courts for the determination of their rights.

²⁵ *Parsons v. Ambos*, 121 Ga. 98, 48 S.E. 696, 697 (1904); cf. *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923); *Blodgett v. Bebe Co.*, 190 Cal. 665, 214 Pac. 38 (1923). In the congressional hearings on the advisability of a federal arbitration statute this reason was assigned as “the real fundamental cause” of the courts’ refusal to enforce arbitration agreements. Hearings before the Senate Judiciary Committee, 69th Cong. 1st Sess., at 15 (1924). The report of the Standing Committee on Commerce, 53 A.B.A. Rep. 337, 352 (1928), concluded that the fear that the stronger party in a labor dispute would have the power to compel the other to submit to a controlled arbitration was at the bottom of opposition to the application of the principle of arbitration in the field of industrial disputes. Later developments, such as the popularity of labor-management arbitration agreements and the frequency with which labor now seeks the aid of the courts in enforcing arbitration agreements, would indicate that this fear had been dispelled.

one of the parties to greater dangers than are inherent in any other consensual relationship. Indeed, the opportunities for oppression and abuse appear to be much greater where one party, suddenly discovering it is to his benefit not to arbitrate at all, is allowed to frustrate the agreement and set at naught the reliance of the other party by escaping his own deliberately assumed obligation.

Nevertheless, it is still the rule in most states that only an agreement to submit an existing dispute will be specifically enforced. Two states, Alabama and South Dakota, expressly declare that any kind of agreement to arbitrate may *not* be specifically enforced.²⁶ One state expressly refuses to permit an arbitration agreement of any kind to be pleaded as a bar to a suit on the subject matter of the dispute;²⁷ in two states the relevant statutes have been construed not to change the rule that any kind of agreement to arbitrate is unenforcible;²⁸ and one statute declares that any agreement to arbitrate may be revoked at any time prior to the publication of the award.²⁹ Two states are silent on the subject.³⁰ In South Carolina the resolution of the question still remains in some doubt,³¹ since there the requirements may, but more likely do not, provide a basis for enforcement. The remainder of the states will enforce an arbitration agreement of some sort, the major division among them being between the enforcement of submission agreements and of future-disputes clauses. Twenty-two states will enforce a submission agreement only,³² nine of them requiring that the submission agreement first be made a "rule of court."³³

The tendency of the states to enforce only submission agreements is

²⁶ Ala. Code Ann. (Michie, West, Harrison, 1940) tit. 9, § 55; S.D. Code (1939) § 37.4602.

²⁷ Mo. Rev. Stat. (1939) § 15233.

²⁸ Nebraska: *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902); *Butler v. Greene*, 49 Neb. 280, 68 N.W. 496 (1896). Mississippi: *Jones v. Harris*, 59 Miss. 214 (1881).

²⁹ N.D. Rev. Code (1943) § 32-2920.

³⁰ Oklahoma and Vermont.

³¹ S.C. Code of Laws (1942) § 7041 (parties must post a bond of double the amount in question to insure obedience to the award).

³² Ark. Civ. Code Ann. (Crawford, 1934) § 494; Fla. Stats. Comp. (1941) c. 57; Ga. Code Ann. (1935) c. 7-2; Idaho Code Ann. (1947) § 7-903; Ill. Rev. Stat. (1947) c. 10, § 1; Ind. Stat. Ann. (Burns, 1933) § 3-201; Iowa Code (1946) § 679.6; Kan. Gen. Stat. (Corrick, 1935) c. 6-101; Ky. Rev. Stat. Ann. (Baldwin, 1948) § 417.010; Me. Rev. Stat. (1944) c. 108, p. 1790; Md. Ann. Code (Flack, 1939) art. 7, § 4; Minn. Stat. (Mason, 1945) § 572.01; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 9974; Nev. Comp. Laws (Hilyer, 1929) § 510; N.M. Stat. Ann. (1941) c. 25-301-25-307; N.C. Gen. Stat. (Michie, 1943) § 1-544; Tenn. Code Ann. (Michie, 1938) §§ 9359-9382; Tex. Ann. Rev. Civ. Stat. (Vernon, 1925) arts. 224-226; Utah Rev. Stat. Ann. (1933) § 104-36-1; Va. Code Ann. (Michie, 1942) § 6160; W.Va. Code Ann. (Michie, 1943) §§ 5499-00; Wyo. Rev. Stat. Ann. (Bobbs-Merrill, 1945) § 3-5601.

³³ Ark., Idaho, Ind., Kan., Me., Mont., Tenn., Va., and W.Va.

thought to be due in some measure to the policy of the Commissioners on Uniform State Laws. The Commissioners promulgated a Uniform Arbitration Act³⁴ directed at all types of arbitration, but confined it to the enforcement of submission agreements. This act was not well received, having been adopted in only four states,³⁵ and the Commissioners have since relegated it to the "inactive list."³⁶ Future-disputes clauses first came into their own in the so-called Draft State Arbitration Act promulgated by the American Arbitration Association. This proposed act did not explicitly mention labor disputes and seems to have been designed for commercial arbitration. New York, in 1920, was the first to adopt it in substance,³⁷ and thus became the first state to provide that an agreement to arbitrate disputes that might arise in the future is both valid and irrevocable. Sixteen states³⁸ and the federal government³⁹ have, to date, enacted arbitration statutes patterned after the Draft State Act. Seven of these states⁴⁰ and Congress,⁴¹ however, have excluded labor-management contracts from the operation of their statutes. When to this group of Draft State Acts is added the Delaware statute, enacted in 1947 and unique in that it covers only collective labor agreements and makes future-disputes clauses valid and enforceable,⁴² there is a total of ten states in which future-disputes clauses appearing in collective bargaining agreements will be enforced.⁴³ In the remainder of the states, and in the

³⁴ 9 Uniform Laws Annotated 61 (1942).

³⁵ Nev. Comp. Laws (Hilyer, 1929) §§ 510-534; N.C. Gen. Stat. (Michie, 1943) § 1-544 et seq.; Utah Rev. Stat. Ann. (1933) § 104-36-1 et seq.; Wyo. Rev. Stat. Ann. (Bobbs-Merrill 1945) § 3-5601.

³⁶ See Handbook of the National Conference of Commissioners on Uniform State Laws 73 (1943).

³⁷ N.Y. Civ. Prac. Act (Thompson, part II, 1939) §§ 1448-69.

³⁸ The following states to date have enacted "Draft State" acts. *Ariz. Code Ann.* (1931) § 27-309; *Cal. Code Civ. Prac.* (Hillyer-Lake, 1947) part 3, tit. X, § 1280; *Colo. Stat. Ann.* (Michie, 1935) Rules of Civil Procedure 109-10; *Conn. Gen. Stat.* (1930) § 5840; *La. Gen. Stat. Ann.* (Dart, 1939) § 405; *Mass. Ann. Laws* (1933) c. 251, § 14; *Mich. Stat. Ann.* (Henrosa, 1943) § 27-2483; *N.H. Rev. Laws* (1942) c. 415 (Amendment, N.H.L. [1945] c. 191, excludes labor contracts unless the arbitration agreement specifies it is subject to the provisions of this chapter); *N.J. Rev. Stat.* (1937) tit. 2, c. 40, § 10; *N.Y. Civ. Prac. Act* (Thompson, part II, 1939) §§ 1448-69; *Ohio Code Ann.* (Throckmorton, 1949) §§ 12148-1-12148-17; *Ore. Comp. Laws Ann.* (1940) §§ 11-601, 602; *Pa. Stat. Ann.* (Purdon, 1930) tit. 5, § 161; *R.I. Gen. Laws* (1938) c. 475, § 1; *Wash. L.* (1947) c. 209; *Wis. Stat.* (Brossard, 1947) § 298.01.

³⁹ 43 Stat. 883-886 (1925), 9 U.S.C.A. §§ 1-15 (1942).

⁴⁰ *Ariz., Mich., N.H., Ohio, Ore., R.I., and Wis.*

⁴¹ 43 Stat. 883 (1925), 9 U.S.C.A. § 1 (1942).

⁴² *Del. L.* (1947) c. 196, § 7.

⁴³ *Cal., Colo., Conn., Del., La., Mass., N.J., N.Y., Pa., and Wash.*

federal courts (with some minor variances)⁴⁴ future-disputes clauses may be disregarded with impunity.

Although these ten states are in a minority, their influence is considerable, especially when it is remembered that they include several of the leading industrial states. Indeed, if it were not for such industrial giants as Ohio, Illinois and Michigan, which still cling to the rule of revocability, it might appear that wherever the need for enforcing the agreement has been felt, the old common-law principles have generally given way.

But even where the common-law principles have given way, it cannot be said that the need has been fully met. Even those states which have enacted the Draft State Acts which include labor agreements in their provisions have not so phrased their statutes as to embrace the whole gamut of labor disputes. They provide for the enforcement only of agreements to arbitrate the type of dispute that may be the subject of an action at law or equity in a civil proceeding. In thus confining the arbitral area to justiciable disputes of this type, these states have failed to give official sanction to a large and important area of industrial arbitration. The pros and cons of this position will be examined shortly.

With the exception of the Delaware act, the statutes so far dealt with have been "general," that is, have been directed at arbitration in general. Employer-employee contracts were expressly excluded in some of those which enforced future-disputes clauses; but these exclusions were more or less afterthoughts and did not otherwise affect the procedural and substantive aspects of the statutes involved. Besides these statutes just discussed, there have been enacted a number of special labor arbitration statutes. This special legislation has been aimed less at the disposition of disputes arising from already bargained collective agreements than at providing a procedure for the settling of bargaining disputes over the terms of contracts yet to be made. Among these are the so-called compulsory arbitration statutes. They usually provide that some government official, often the governor, either upon a report made to him by a state investigating board or upon the application of one of the disputants, can order the parties to arbitrate and can prevent them from taking recourse to self-help until the arbitration is completed.⁴⁵ These statutes are all confined to the sphere of public utilities or public service enter-

⁴⁴ Note the discussion of the Federal Arbitration Act p. 259 *infra*.

⁴⁵ Eleven states have this type of statute. Fla., Ind., Mich., Minn., Mo., Neb., N.J., Pa., Tex., Va., and Wis. For a discussion of these statutes see Bernstein, Recent Legislative Developments, 1 *Indust. & Lab. Rel. Rev.* 406 (1948).

prises such as hospitals. In recent years quite a few statutes of this type have sprung up.⁴⁶ But since they are confined to a very limited class of relationships, their influence in shaping the broader aspects of industrial or labor arbitration has been negligible. Moreover, they have not been received favorably in the courts, several of these acts having been declared unconstitutional either because they were thought to be violations of basic rights,⁴⁷ or for more technical reasons.⁴⁸ Compulsory arbitration of any type has never been politically popular in this country; and its use can probably be justified only in the public interest for the settlement of otherwise insoluble problems.

In the sphere of voluntary arbitration agreements it is highly doubtful whether any of the special labor statutes make either an existing or a future-disputes agreement enforceable where it had not been so before. The major purpose of these special labor statutes is to promote arbitration rather than to enforce it. They set up permanent and temporary tribunals to hear grievances and disputes; conciliation and mediation facilities are established; boards and agencies are created to investigate and perhaps to arbitrate if called upon.⁴⁹ Several states have permanent state boards of arbitration.⁵⁰ The majority provide *ad hoc* tribunals for voluntary arbitration of labor disputes.⁵¹ In seven states the governmental bureau which is in charge of labor may act as the arbitration agency.⁵² It is apparent that in the main these statutes simply provide the machinery for voluntary adjustment of labor disputes, leaving the

⁴⁶ Many of these statutes were passed in 1947. The development of compulsory settlement of labor disputes in this country is considered in detail in Williams, *The Compulsory Settlement of Contract Negotiation Labor Disputes*, 27 Tex. L. Rev. 587 (1949).

⁴⁷ Compare *Wolff Packing Co. v. Kansas Court of Industrial Relations*, 262 U.S. 522 (1923); *State ex rel. Dairyland Power Cooperative v. WERB*, 14 C.C.H. Lab. Cas. ¶ 64385 (Wis. C.C., 1948), vacated on other grounds and remanded 15 C.C.H. Lab. Cas. ¶ 64638 (Wis. S. Ct., 1948). The case was dismissed in the lower court on the remand since the labor dispute had been settled. 15 C.C.H. Lab. Cas. ¶ 64715 (Wis. C.C., 1948).

⁴⁸ The flaw in the Michigan statute was in vesting in the presiding judge of the circuit in which the dispute arose the power to appoint a circuit judge as chairman of the board of arbitration. This was held to violate the Michigan constitution as an attempt to confer non-judicial duties upon a judicial officer. *Local 170, Transport Workers Union of America, CIO v. Gadola*, 322 Mich. 332, 34 N.W. 2d 71 (1948).

⁴⁹ These statutes, among others, are compiled and elaborately catalogued in a study prepared under the direction of David Ziskind for the Office of the Solicitor, Department of Labor. *Labor Arbitration under State Statutes* (U.S. Dep't of Labor, 1943). The important arbitration statutes that have been enacted subsequent to this study have been included in various sections of this article.

⁵⁰ *Ibid.*, Analytical Table of State Labor Arbitration Statutes 26: Colo., Conn., Maine, Md., Mass., Mont., N.H., and Okla.

⁵¹ *Ibid.*

⁵² *Ibid.* Cal., Ill., Kan., Ohio, S.C., Vt., and Wis.

parties free to use or not to use the machinery as they see fit. Some states go a little further and empower an agency to inquire into the causes underlying the dispute and to publish a report, or, in addition, to state who is at fault.⁵³ Here the attempt is to secure industrial peace by public pressure. This method has obvious shortcomings. The archaic and chaotic condition of the state statutes on the subject is indicated by the requirement in some of them that in order to be arbitrated, disputes must *not* involve questions which may be the subject of a civil action.⁵⁴ These were enacted at an early date when it was feared that arbitration statutes might be declared unconstitutional if they appeared to divest the courts of jurisdiction. They present an ironic contrast to currently prevailing beliefs that only justiciable disputes may be arbitrated.

In an elaborate study of the state arbitration statutes, made under the direction of David Ziskind and published by the U.S. Department of Labor, the following comparison between the "general" and the "special" labor statutes was made:

The extent to which court action is regarded as an aid to voluntary arbitration is the outstanding difference between the statutes designed for labor arbitration alone and statutes intended for commercial as well as industrial arbitration. None of the statutes enacted solely for labor disputes makes arbitration agreements irrevocable, or provides for an injunction to compel persons to proceed to arbitration. . . . [M]ost of the general arbitration statutes do provide that arbitration agreements are irrevocable, hence the arbitration once voluntarily approved may be enforced by court order under those statutes. Many of the general arbitration statutes also provide for a rule of court which makes the arbitration an auxiliary court function and makes possible the use of court powers in expediting the proceedings or in enforcing the award. None of the special labor statutes has such a provision. The general statutes usually provide for court appeals from awards and for definite steps to convert awards into court judgments. The labor statutes contain fewer references to court appeals and court judgments; nearly all of them merely declare the arbitration awards to be binding or final. There is much greater reliance in the labor statutes upon the common-law procedure of filing separate court actions to enforce awards than upon the direct translation of awards into court judgments, found in most of the general statutes.

Instead of stressing the inviolability of arbitration contracts, the approach of many of the special labor statutes to the arbitration of labor disputes is to provide for permanent officials charged with the duty of encouraging resort to arbitration.⁵⁵

Indeed, in some instances the special statutes have had a negative effect upon the "inviolability of arbitration contracts." Where before it

⁵³ For example: Minn., Ch. 364, L. 1938 and Ch. 111, L. 1939; Md., Ch. 938, L. 1945 (report assigning blame must be published in a newspaper).

⁵⁴ The Illinois special labor statute, passed in 1895, provides that any controversy between an employer and an employee not involving a question which may be the subject of an action at law or bill in equity may be arbitrated. Ill. Rev. Stat. (1947) c. 10, §§ 20-30.

⁵⁵ Labor Arbitration under State Statutes (U.S. Dep't of Labor, 1943).

had been assumed that a general statute which enforced arbitration agreements was applicable to labor agreements, the "special" type of statute has had the effect, in one instance at least, of inducing a court to read industrial arbitration out of the general statute.⁵⁶

There is no question that the great mass of these special labor arbitration statutes are "dead letters." Some of them are completely outmoded. The statutes designed to encourage arbitration are commendable. The others, however, either attempt to dodge the issue by simply providing facilities for arbitration which the parties may use, or else they go too far in seeking to intrude state-selected arbitrators into the situation. The criticism of the first method is that, if the parties want to arbitrate, elaborate facilities are not needed. The second method is undesirable because either one side or the other will almost always be prejudiced against using the state arbitration machinery. If the only permissible means of arbitrating is to submit the dispute to a state-created tribunal, there probably will not be any arbitrating. From a study of the strikes settled with the help of the United States government during the years 1938-42, based on the annual report of strikes issued by the Division of Industrial Relations in the Department of Labor, Professor Braun draws the conclusion that conciliation was acceptable where government officials or boards carried on the negotiations, but that when arbitration was necessary, the parties were more willing to submit to it when private persons or private boards were used.⁵⁷

III. CURRENT ATTITUDES TOWARD ARBITRATION

Thus it is seen that the only state statutes which might be used to enforce industrial arbitration agreements—the "general" statutes—either exclude the labor contract, apply only to "justiciable disputes," or are confined, in the overwhelming majority of instances, to the enforcement of submission agreements. The exclusion of contracts between employers and employees from the operative effects of the "general" statutes is the result partly of historical development, as has already been noted, partly of a fear of violating the constitutional injunction against involuntary servitude, and partly due to the opposition of organ-

⁵⁶ The Illinois statute passed in 1895, while providing that the parties could avail themselves of the Illinois Department of Labor for mediation and/or arbitration, made no provision for enforcing the arbitration agreement. In 1917 Illinois enacted a "general" arbitration statute, making agreements to arbitrate existing disputes enforceable. Ill. Rev. Stat. (1947) c. 10, §§ 1-18. Recently an Illinois court announced, obiter, that since the 1895 statute mentions labor, and the general statute does not, the general statute does not apply to labor-management agreements. In re Matter of William Cregaer, 323 Ill. App. 594 (1944).

⁵⁷ Braun, *The Settlement of Industrial Disputes* 15, 16 (1944).

ized labor to the inclusion. The first of these, the historical explanation, is simply that the commercial world felt the need for these arbitration statutes long before the industrial world did. The statutes were promulgated and presented by commercial interests, and any stipulation at all concerning labor was an afterthought. There is nothing in this explanation that goes to the merits of the exclusion.

In the face of union and management pronouncements of their preference to arbitrate, it is puzzling to learn that organized labor is in good measure responsible for the exclusion of the collective bargaining agreement from the terms of the "general" arbitration statutes. As with the first explanation, the reasons here are also primarily historical, based upon the varying attitudes of judges, legislatures and labor leaders operating in a constantly shifting social and political context. The previous discussion of the state statutes reflects labor's antagonisms toward the courts amply. An outgrowth of this attitude was organized labor's decision to rely only on self-help and to reject all other sanctions to enforce collective bargains. This attitude can be assigned as the basic reason for the AFL's opposition to the 1940 amendment of the New York Arbitration statute which made, or was designed to make, practically any labor-management agreement to arbitrate valid and enforceable.⁵⁸ It is hard to believe that this opposition was based upon any general objection to arbitration; and it is doubtful whether objection would generally be made today.⁵⁹

On the whole, organized labor has come around and now recognizes the arbitration agreement, not as a device to enlist the aid of the courts on the side of the employer, but as a device to further collective rule-making along lines designed as closely as possible to execute the intention of the private parties concerned. Moreover, labor unions now recognize this device as a peaceful method of preserving bitterly-won bargaining gains. And arbitration affords interludes of peace in the never-ending struggle involved in collective bargaining. Labor is still wary of the courts, but there is a growing recognition on the part of labor that the courts, in enforcing agreements to arbitrate, are fulfilling the judicial

⁵⁸ Note the discussion of this amendment p. 249 *infra*.

⁵⁹ The latest pronouncements of labor spokesmen indicate a strong policy on the part of labor favoring voluntary arbitration. See Woll [counsel for the A.F. of L.], *The Adverse Effect on the Principle of Voluntary Arbitration of the Taft-Hartley Act . . .*, 3 *Arb. J. (N.S.)* 46 (1948). However, at least one recent instance must be noted of effective opposition on the part of labor to legislation which would have made future-disputes clauses enforceable. The Illinois Federation of Labor was responsible in large measure for the defeat of such a proposal before the Illinois legislature in the spring of 1949.

function of protecting the valid expectations of the parties and are no longer imposing anti-union sanctions like the labor injunction.

The fear of violating the constitutional mandate prohibiting involuntary servitude has proved baseless in enforcing agreements to arbitrate. The same argument has been made against the enforcement of collective bargaining agreements generally. States which have enforced both types of agreements have not run into constitutional difficulties.⁶⁰ The analogy between personal service contracts and collective bargaining agreements seems specious. The collective bargaining agreement is not labor's surrender to involuntary servitude, but its answer to it.

The real points of stress in the law of arbitration today arise from questions as to whether arbitration of nonjusticiable disputes should be enforced, and whether future-disputes clauses as well as submission agreements should be enforced. The objection to enforcing future-disputes clauses has been dealt with previously⁶¹ in discussing the fear that if such agreements were enforced "the strong would oppress the weak." The real explanation probably is that the legislatures have been afraid to overturn a rigid common-law rule of ancient origin. Since the Draft State Arbitration Act, and its adoption by New York in 1920, no serious argument has been advanced for refusing to enforce future-disputes clauses (at least in a jurisdiction that is willing to enforce arbitration agreements at all). Of course, it has been said that it seems more reprehensible for a party to back out of an agreement to arbitrate entered into *after* a dispute has arisen, than for a party to ignore such an agreement consummated *before* the dispute arose. In the latter situation, the party renegeing contends that he did not anticipate that particular type of dispute. Similarly, disputes as to the interpretation and application of a contract are always foreseeable—but this may not be as true of the "bargaining dispute." One wonders whether, at bottom, the objection to enforcing future-disputes clauses is not the same as the objection to the enforcement of agreements to arbitrate nonjusticiable disputes: namely, that they are so difficult to foresee that the parties could not have contemplated their effect in the initial negotiations. But unforeseen problems may arise under every contract, and this fact has not impaired normal contract obligations. So at best the fear of the "unforeseen" should result in the position that future *justiciable* disputes clauses only

⁶⁰ Compare *Harper v. Local Union No. 520*, 48 S.W. 2d 1033 (Tex., 1932); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *Matter of Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 130 N.E. 288 (1921).

⁶¹ P. 239 *supra*.

should be enforced, and not that all future-disputes clauses should be unenforcible. However, an examination of the merits of arbitrating the industrial nonjusticiable dispute reveals that such a limitation would be productive of more harm than good.

IV. THE NONJUSTICIABLE DISPUTE

Arbitration of the nonjusticiable dispute is a product largely of industrial relations. Disputes as to union recognition, new wage provisions, or perhaps a form of union security under an already existing contract cannot be settled in the courts. If they are to be settled at all, they must be arbitrated. Nevertheless, the majority of arbitration statutes state that only disputes which may be the subject of an action at law or suit in equity can be arbitrated under the statutes. The result is that much of labor arbitration is excluded from the enforcibility provisions of these statutes. The requirement itself is anomalous, since at common law any dispute could be arbitrated.⁶² The legal sanctions—those there were—applied to all arbitrations alike. Thus, awards settling nonjusticiable disputes which would have been upheld at common law may be stricken as defective under the statute.⁶³ It cannot be denied, however, that there is an essential difference between the arbitration of a dispute arising under an already established contract—disputes as to “rights”—and the arbitration of so-called disputes as to “interests,” e.g., wage issues and other collective bargaining matters. These last disputes arise most frequently in the attempt to agree upon the terms of a new contract. Whether or not their settlement can be brought under the heading of arbitration at all is a disputed question.

There are those who maintain that this is not arbitration at all. “Real arbitration would properly seem to imply the disposition of a dispute in accordance with some standard—possibly a law, a trade practice or a provision in a contract—which the parties to the dispute concede to exist, although they cannot agree upon what it means or how it is to be applied in a particular case.”⁶⁴ Courts fulfill this sort of function; and in this sense arbitration is a substitute for the judicial process. Labor-management groups, however, also use arbitration as a substitute for collective bargaining. It is not uncommon for labor and management to submit an adjustment to arbitration if they cannot agree on the pro-

⁶² See Annotation, 47 L.R.A. (N.S.) 380, 443 (1911).

⁶³ Compare *Continental Bank Supply Co. v. Internat'l Brotherhood of Bookbinders*, 239 Mo. App. 1247, 201 S.W. 2d 531 (1947).

⁶⁴ Gregory, *Labor and the Law* 402 (1946).

posed changes in the contract or the wage rate. This is especially so in situations where the contract runs from year to year subject to reopening provisions for change each year, or where the wage rate is made a flexible one, determined by the cost-of-living index or business conditions at the time of renewal. In the sense that the parties have abjured recourse to further bargaining in situations of this sort, arbitration in these instances is arguably *not* a continuation of the collective bargaining process at all. Collective bargaining in the ordinary sense ended when the parties were unable to agree on the matter in issue and called in an arbitrator to reach a decision for them. He is a substitute for a bargaining process which has broken down in circumstances where the parties could not call in a court. Indeed, as Mr. Fraenkel has pointed out, the courts cannot use the "ouster" rationale to refuse to enforce this kind of arbitration, for the courts would not hear the dispute in any case.⁶⁵ Nevertheless, in a jurisdiction which has been foremost in the enforcement of arbitration agreements, the court has balked at taking this step.

In the *Matter of Buffalo & Erie R. Co.*⁶⁶ the New York Court of Appeals refused to enforce an agreement to arbitrate a wage provision in a yearly collective agreement which was up for renewal. The court found as its stumbling block that "no power exists in the courts to make contracts for people. . . . A contract that the court shall determine what an agreement shall be for the future is unenforceable, unless the lines of the agreement have been laid out by the parties."⁶⁷ In his dissent Judge Pound commented tersely, "The court makes no contract for the parties. It enforces one already in existence."⁶⁸ The New York state legislature was not persuaded by the argument of the majority, or rather, was convinced of the desirability of arbitrating such disputes, and some time thereafter amended its arbitration statute in the following manner: "A provision in a written contract between a labor organization, . . . and employer or employers . . . to settle by arbitration a controversy or controversies thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms or conditions of employment . . . shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁶⁹

⁶⁵ Fraenkel, Civil and Commercial Arbitration Law—The Legal Enforceability of Agreements to Arbitrate Labor Disputes, 1 Arb. J. 360 (1937).

⁶⁶ 250 N.Y. 275, 165 N.E. 291 (1929).

⁶⁷ *Ibid.*, at 292.

⁶⁸ *Ibid.*, at 293.

⁶⁹ N.Y. Civ. Prac. Act (Thompson, part II [Supp. 1942]) § 1448. As the New York statute was originally written, only disputes which could be the "subject of an action" were arbitrable.

As a result of this amendment, the New York courts will now enforce the arbitration of nonjusticiable labor-management disputes;⁷⁰ but they still refuse to decree the arbitration of disputes arising over the terms of a new contract.⁷¹ Resourceful lawyers are already seeking a passage around this position, writing collective agreements in such a manner that changes or modifications in the agreement may be arbitrated under the guise of the old contract. Thus, while paying lip service to the New York doctrine, a New Jersey court enforced an agreement to reopen and to arbitrate the question as to whether certain wage adjustments stipulated in a contract were to become effective or not.⁷² Under such a view any reopening provision would pass muster as an arbitrable matter under an existing contract. It is apparent that the arbitrator would be faced with much the same problems involved in a dispute over a clause in a new contract.

It is not difficult to see the underlying basis of the New York doctrine. It is the spectre of "compulsory arbitration" that has frightened the courts. The perils of *forcing* parties to arbitrate the provisions of a new contract are obvious. The parties are deprived of the ultimate sanctions of collective bargaining—recourse to self-help. The contract is imposed from above, rather than proposed from below. But the situation would appear to be somewhat different when the parties have *agreed* to arbitrate provisions of the new contract. There the consensual element is present. The parties have voluntarily forsworn their privileges of self-help. They have defined the jurisdiction of the arbitrator; they have provided a means for submitting the dispute to him; and they have determined at what point—probably only after complex conciliation and mediation procedures have been followed—the dispute will be submitted. And, most important, they have provided for the selection of their own arbitrator. Thus, if compulsory arbitration be a spectre in this situation, it is indeed an illusive one.

A more substantial objection to enforcing the arbitration of disputes concerning new contract provisions is the absence of any fixed criteria or standard to guide the arbitrator in his deliberations. The arbitrator

⁷⁰ Compare Local 474, Nat'l Food Chain Store Employees, CIO v. Safeway Stores, 274 App. Div. 779, 81 N.Y.S. 2d 142 (1948) (order to arbitrate dispute over change of normal working hours); In the Matter of Miroflex Products Co., 192 N.Y. Misc. 673, 80 N.Y.S. 2d 788 (1948) (whether salary may be reduced is a proper matter for arbitration).

⁷¹ Marseillaise French Baking Co. v. O'Rourke, 121 N.Y.L.J. 1270 (1948); cf. Kallus v. Ideal Novelty and Toy Co., 292 N.Y. 459, 55 N.E. 2d 737 (1944); Ford Instrument Co. v. Dillon, 77 N.Y.S. 2d 72 (1947).

⁷² United E. R. & M. Workers v. Nat'l Pneumatic Co., 134 N.J.L. 349, 48 A. 2d 295 (1946).

is on the spot. The area of the parties' demands somewhat delimits his task; but this is apt to be deceptive. If the arbitrator is an expert in the particular industry he may have enough knowledge of analogous past situations to guide him in reaching his decision. Certainly, such an arbitrator would have enjoyed the full confidence of both parties when he was selected, and probably would continue to do so, although one party came to believe that it would get more by self-help. Surely if such earlier confidence was at all warranted, his decision should be more acceptable than one achieved by recourse to industrial warfare.

More and more, as arbitrators gain experience in arbitrating such disputes, governing principles will be evolved. It has already been claimed, "The arbitration of a wage dispute is not an unpredictable process."⁷³ But a more realistic conclusion would seem to be that of David Cole, who admits: "It may fairly be said that at present the setting of wages is a subjective matter, and that it varies with the arbitrator. This is not as hazardous as it sounds, however, because the purposes and philosophies of the several arbitrators is [*sic*] quite well known to the parties before they are selected."⁷⁴

It is unfortunate that a refusal by the courts to enforce arbitration of the nonjusticiable dispute is tantamount to their decreeing industrial strife. These are the most vexing disputes—the ones over which unions are most likely to strike. Furthermore, the result is almost bound to be that someone will lose an advantage which he thought he had secured in the contract and will be adversely affected by changes in the bargaining climate against which he had tried to guard in the agreement itself.

Disputes, strikes, and other forms of labor-management warfare are bound to occur in a free-enterprise society, and as one writer has observed,⁷⁵ "[T]he best technique of reducing their number is the creation of labor conditions which satisfy both parties to the greatest possible extent. A further condition of smoothly functioning labor-management relations is the unconditional acknowledgment of the sanctity of contracts and the necessity of absolute adherence to all contractual obligations." Combining this thought with the similarly basic principle that in "true" arbitration the parties are free to select their own arbitrator, there seems to be no reason why the parties to a labor dispute should not

⁷³ Justin, *Arbitrating a Wage Dispute Case*, 3 Arb. J. (N.S.) 228 (1948).

⁷⁴ Cole, *Fixed Criteria in Wage Rate Arbitration?*, 3 Arb. J. (N.S.) 169, 174 (1948). Mr. Cole is Chairman of the Basic Steel Panel of the NLRB.

⁷⁵ Braun, *The Settlement of Industrial Disputes* 21 (1944).

be compelled to honor their voluntary commitments to arbitrate a dispute over the terms of a new contract, or any other nonjusticiable matter.

V. ARBITRATION OF GRIEVANCES

Vital as the arbitration of disputes concerning "interests" may be, by far the most important and widespread use of arbitration in the labor relations field has been in the disposition of grievances arising under collective agreements. This has resulted in the transfer of disputes concerning "rights" from the judicial to the arbitral arena. An integral part of the modern collective agreement is a grievance procedure—a device for the settlement of claims arising from alleged violations of contract provisions. This procedure is usually reserved for disputes over the interpretation or application of the collective agreement, with arbitration as the last step of the procedure, to be used after all efforts to settle grievances by bargaining have failed. There may be four or five steps in a grievance procedure. The aggrieved employee may be required first to take up his "claim" or grievance with his foreman; then, if no settlement is reached, a union representative will be called in. The next step, provided no settlement has been effected, will involve a conference with higher officials of the company and, perhaps, of the union as well. The last steps require meetings between the union representatives and company officials, perhaps providing ultimately for a conference between national representatives of the local's union and top management. The final action will be submission to arbitration.

From this it becomes apparent that arbitration facilities and proceedings must be so effective that the contending groups will submit to these procedures rather than resort to industrial warfare or litigation. The dispute may not be a "large" one, but if it gets to the arbitrator it is going to be a sharply contested one. "Hence arbitration, as the final step of the grievance procedure, provides an adequate means of settling these disputed issues, a perfect face-saving device for the parties who are at loggerheads, each hating to back down, and a convenient technique for the avoidance of the kinds of frictions that eventually boil over into strikes."⁷⁶

The courts are not equipped to fulfill this arbitral function. In litigation the object of each party is to win his immediate objectives. The procedure can end only in victory for one party and defeat for the other; for except within very narrow limits a judge cannot couch his decisions

⁷⁶ Gregory & Katz, *Labor Law, Cases, Materials and Comments* 1198 (1948).

in the fluid and casual terms familiar to arbitrators. Of greater importance, however, is the circumstance that the strict judicial process is not conducive to good will and amicable relations. Litigants are strangers, for the most part; employers and employees live together. Continuous adjustment and not permanent disposition of the occasional matter of disagreement, is the result desired. The fact that settlement by arbitration is a friendlier method than court proceedings, the greater informality of arbitration, the parties' greater influence in the composition of the deciding tribunal, and the formulation of their own rules of procedure, all argue for submitting the dispute to this extra-judicial procedure. An additional reason for labor disputants choosing arbitration is that they can be represented on the arbitration board. Whether or not it is justified,⁷⁷ the undeniable effect of this is to induce greater faith in the competence of the deciding tribunal. Finally, the peaceful settlement of the labor dispute cannot await the convenience of crowded court calendars.

The judicial tradition itself has not been one to generate confidence in labor disputants. Of late the realization has become current that while courts may be impartial between man and man in proper controversies, there is not so much assurance that they can achieve the same impartiality between contending groups of employers and employees. It may be argued that it is equally difficult for an arbitrator to be impartial. This may be true, but in arbitration, at least, the parties are able to select the peculiar "conglomeration of prejudices" which they believe will lead to the most expedient adjustment. The arbitrator in all probability will be an expert in labor-management relations. Moreover, he is not expected, as is the judge, to apply legal principles solely. He is expected to employ ethical concepts and precepts of behavior resting upon custom or public opinion. (Of course, it cannot be gainsaid that some judges follow

⁷⁷ Judge Evans found the partisan arbitrator an anomaly. In a suit to impeach an award settling a wage dispute under the Railway Labor Act, 48 Stat. 1185 (1934), 45 U.S.C.A. §151 (1943), where the arbitrators had been unable to agree at first sitting, Judge Evans commented, "An open-minded consideration of the questions at issue can hardly be expected where arbitrators are chosen to represent contestants. It is somewhat of a misnomer to call them arbitrators. They are advocates. It could hardly be expected that such partisans would surrender one iota of their claims until the arrival of the psychological moment for concessions."

"And such contentions of the partisan members, persistently asserted, would prove discouraging to the neutral arbitrators whose inclinations and desires would be to terminate their labors before exhausting all efforts to reach an agreement."

"... Doubtless it [Congress] . . . acted on the assumption that these [partisan] members would bring to the body as a whole, information and experience that would be valuable. But, at the same time, it necessarily made a speedy disposition of the controversy more difficult." *Atchison, T. & S. F. Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 26 F. 2d 413, 419 (C.C.A. 7th, 1928).

the same process, but it is more difficult to convince a layman of this.) All in all, it must be conceded that the arbitrator brings something to the labor-management dispute which a judge could not bring to it.

VI. STATE ENFORCEMENT OF ARBITRATION AGREEMENTS

In the various states the movement toward enforcement of industrial arbitration agreements has already started. Delaware has been the first to enact a special labor statute that expressly enforces arbitration agreements.⁷⁸ The state of Washington's old "general" statute had excluded labor agreements unless the parties had specifically provided in the agreement that the statute was to apply. This was amended in 1947 to provide that employers and unions may agree upon any method and procedure for the settlement of existing and future disputes and their agreements be valid and enforceable to the same degree as any other contract.⁷⁹

In view of the fact that the first statutory undertaking to enforce future-disputes clauses in arbitration agreements (including labor-management agreements) occurred in 1920, a trend toward greater enforceability is apparent, in spite of its slow beginning. The courts, also, have responded somewhat to the demand for enforcement of these agreements. Indeed, the Minnesota court has taken the incredible step of overturning the common-law rule!⁸⁰ The only other state court to have gone so far is the Colorado Supreme Court, which accomplished the same result as early as 1925 with no disturbing repercussions.⁸¹ These decisions constitute an important step ahead; for despite the many statutes in this field the influence of the common law remains potent. This is because in all but one of our states⁸² the parties have the choice of following the statutory procedure or of formulating their own rules. But if they choose the latter course, the arbitration is governed by common-law principles. The statutes have been held merely to have supplemented the common law, not to have overturned it.⁸³ Thus, most

⁷⁸ Del. L. (1947) c. 196, § 7.

⁷⁹ Wash. L. (1947) c. 209.

⁸⁰ *Park Construction Co. v. Independent School District*, 209 Minn. 182, 296 N.W. 475 (1941).

⁸¹ *Ezell v. Rocky Mountain Bean & Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925).

⁸² The courts in the state of Washington have declared that with the passage of their state arbitration act common-law arbitrations disappeared in Washington. Compare *Gord v. F. S. Harmon & Co.*, 188 Wash. 134, 61 P. 2d 1294 (1936).

⁸³ Compare *Cockrill v. Stamoules*, 68 Cal. App. 2d 184, 156 P. 2d 265 (1945); *Alexander v. Fletcher*, 206 Ark. 906, 175 S.W. 2d 196 (1943); *Sukonik v. Shapiro*, 333 Pa. 289, 5 A. 2d 108 (1939); *Ezell v. Rocky Mountain Bean & Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925).

of the state courts have two possible legal agencies whereby they may enforce arbitration agreements. One is the common law, which would necessitate reversing many old decisions, and the other is applying, wherever possible, the arbitration statutes of the state. Obviously this latter alternative can have only limited success.

The courts of Pennsylvania long ago decided that the exclusion in Pennsylvania's arbitration statute of "personal service contracts" did not apply to collective bargaining agreements.⁸⁴ Since that exclusion was inserted to avoid violation of the constitutional prohibition of involuntary servitude—an objection clearly inapplicable in the situation before the court—this construction appears well justified. Of late, however, this interpretation has been questioned. The Pennsylvania arbitration act has been held not to apply to an arbitration proceeding in which the union requested an award for the reinstatement of an employee.⁸⁵ Thus, the situation in Pennsylvania appears to be that the nature of the dispute, and not the fact that it arises under a collective agreement, is the determining factor as to whether the statute may be used to enforce the agreement.

The California courts, on the other hand, have had to hold that collective bargaining agreements are not "contracts pertaining to labor" in order to make enforceable arbitration clauses appearing in such agreements.⁸⁶ The California arbitration statute is one of the Draft State type, making agreements to arbitrate irrevocable, except that ". . . the provisions of this title shall not apply to contracts pertaining to labor."⁸⁷ A suit was brought by a garment workers' union to enforce an arbitration award. The defendant pleaded that the agreement, and hence the award, was not enforceable at common law and had not been made enforceable by statute. But the court found that a collective bargaining agreement was not a contract "pertaining to labor" within the meaning of the California statute and specifically enforced the award. On the face of it this seems far-fetched,⁸⁸ but the California Supreme Court justified its position by pointing out that the exception had been made in its statute, as in Pennsylvania's, to afford protection against possible involuntary servitude.

⁸⁴ *Kaplan v. Bagrier*, 12 Pa. D. & Co. Rep. 693 (1929).

⁸⁵ *Retail Drug Union v. Sun Ray Drug Co.*, 12 B.N.A. Lab. Arb. 418 (Pa. Ct. C.P., 1949).

⁸⁶ *Levy v. Superior Court*, 15 Cal. 2d 692, 104 P. 2d 770 (1940).

⁸⁷ Cal. Code Civ. Proc. (Bender-Moss, 1947) part 3, tit. X, § 1280.

⁸⁸ A note in 14 So. Calif. L. Rev. 64 (1940) criticizes the court for distorting the statute. See 29 Calif. L. Rev. 411 (1941) for a more sympathetic critique.

Some courts, however, have been unable to construe their statutes in such manner. The Ohio General Arbitration Act is fairly explicit in excluding labor contracts. It provides that "the provisions of this act shall not apply to (a) collective or individual contracts between employers and employees in respect to terms or conditions of employment."⁸⁹ In the face of this unambiguous language, the Ohio courts feel that their hands are tied. In refusing to enforce an arbitration agreement, in a suit brought by a union to compel a recalcitrant utility company to arbitrate, a lower Ohio court declared: "The Court is not adverse to accepting the view that all valid contracts made by mature men should be specifically enforced; that pretexts should not be resorted to, to evade them; and that where no argument exists based on reason and justice or common morality for avoiding a valid agreement, compulsory performance of such agreements should be decreed. Yet no Court can contravene positive legislative enactments, or ignore the pronouncements of its superior courts."⁹⁰ It should be noted in passing that Ohio has three special labor arbitration statutes designed to promote and encourage the arbitration of labor disputes.

The prospects for establishing state enforcement of industrial arbitration agreements do not appear bright. Only the most vigorous and daring of courts seem willing and able to break through the dark and tangled web of precedent on the subject. And even courts capable of the most liberal statutory construction are confronted by statutes which close the door firmly against enforcement. True, a statutory trend toward enforcement of these agreements is discernible in the states, but this at best is an unwieldy solution. Even if the process of persuading state legislatures to amend their arbitration laws were a reasonable or practical one, this solution would not be completely satisfactory. For lack of uniformity is bound to ensue (at least, it has in everything else the states have done); and in the peculiar context of labor relations, uniformity of law is essential if agreements to arbitrate are to be effectively enforced.

With the growth of national labor organizations and the resulting unionization of whole industries, the "master collective bargaining agreement" has come upon the scene, governing large segments of labor-management relationships on a sectional or nation-wide basis. These agreements are drawn so as to cover an international union and all of

⁸⁹ Ohio Code Ann. (Throckmorton, 1940) § 12148-1.

⁹⁰ *Utility Workers Union v. Ohio Power Co.*, 36 Ohio Ops. 324, 326, 77 N.E. 2d 629, 632 (1947).

its locals, as well as a corporate employer and all of its widespread plants organized by that union. Indeed, some of them cover many companies. Thus, such agreements may cover employment units in a great number of jurisdictions, spread over the length and breadth of the United States. Under a "master contract" negotiated in Chicago, a grievance may arise in Utah and, perhaps, be arbitrated in a third state. This would present almost insuperable problems of enforcement in the present context of widely varying judicial attitudes and the complex set of conflicts-of-law rules in which the subject is enveloped.

Much of the confusion and instability surrounding the enforcement of arbitration agreements stems from the fact that, by and large, each state will treat an arbitration agreement according to the dictates of its own legal attitude on the subject. Unlike other contracts, the place where the agreement was made, and even the intention of the parties as to which law will apply, likely as not will be ignored. This conflicts-of-law result is an outgrowth of two completely dissimilar attitudes toward arbitration. The first of these was the early conviction of some courts that the agreement should not be enforced. The second was the attitude deemed necessary to safeguard the constitutionality of the new arbitration statutes. Both of these positions were achieved by labeling the arbitration provisions as a "procedural" remedy.⁹¹ This enabled courts to refuse to enforce foreign-made agreements to arbitrate on the ground that procedure was a matter for the forum to decide.⁹² And later, decisions upholding the constitutionality of arbitration statutes were facilitated by regarding such statutes as mere regulations of the procedures which the courts were to follow.⁹³ The result of all this has been that an agreement to arbitrate is valid or invalid according to the laws of the state in which the agreement is made; but whether or not the agreement will be enforced is for the law of the forum to decide. It is apparent that such a doctrine can produce only confusion and unpredictability.

As one writer has pointed out, the courts stuffed the arbitration clause

⁹¹ Phillips traces the origins of "lex fori" as applied to arbitration cases in *Arbitration and Conflicts of Laws: A Study of Benevolent Compulsion*, 19 *Corn. L.Q.* 197, 213 et seq. (1934).

⁹² *Meachem v. Jamestown Ry.*, 211 N.Y. 346, 105 N.E. 653 (1914).

⁹³ *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 130 N.E. 288 (1921). This approach can be rationalized in suitable legal terminology. As Justice Brandeis said, "The substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation. . . . The reluctance of the federal court goes merely to the remedy." *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123 (1924). Previously the federal rule had been that the state arbitration acts could not affect the power of the federal courts. The agreement was void no matter where made. *Lappe v. Wilcox*, 14 F. 2d 861 (1926); *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006 (D.C.N.Y., 1915).

into the "procedure" pigeonhole in order to effectuate their policy notions on the matter.⁹⁴ Still, the law today would be much simpler if courts had merely refused to enforce these agreements on policy grounds alone rather than by achieving their ends through dressing up these clauses in unsuitable clothing. The arbitration clause is hard to distinguish from any other clause in the contract, and the line between "substance" and "procedure" is a shadowy one indeed. In England, for example, the enforcement of an arbitration agreement is considered a matter of substance, to be determined by the law of the place of performance.⁹⁵

In late years the federal courts have placed the arbitration clause in its proper context in the law of contracts. The Supreme Court, albeit without departing from the doctrine that the enforceability of these agreements is a matter of procedure, has announced that the federal courts will determine whether or not to enforce an arbitration agreement by looking to the law of the place where the agreement had been made.⁹⁶ Thus, if the agreement to arbitrate had been made in a state which provides for enforcement, an action in a federal court on a dispute arising under the contract will be stayed pending compliance with the arbitration provision. Otherwise the suit will be entertained. The result is certainly a step toward consistency in the enforcement of arbitration agreements; but so long as the state courts cling to the conflicts rule that enforcement will be decreed or refused according to the law of the forum, the step will have little effect.

Awards, on the other hand, have received a more consistent judicial treatment than that accorded the unexecuted agreement. In keeping with the common-law view that the award would be sanctioned legally even though the bare agreement would not,⁹⁷ most states will enforce an award rendered in a foreign state. Of course, the speedy remedies provided by the modern statutes are not available to enforce an award handed down in a foreign state,⁹⁸ but the award can be enforced by

⁹⁴ Phillips, *op. cit. supra* note 91.

⁹⁵ *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; *Spurrier v. LaCloche*, [1902] A.C. 446.

⁹⁶ *Shanferoke Coal and Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1934).

⁹⁷ Cases and authority cited note 8 *supra*.

⁹⁸ The power of the court to enforce awards summarily stems from the arbitration statute. In the absence of specific statutory authority the common-law method is the only method available for enforcing foreign awards. *United Electrical, Radio and Machine Workers of America (U.E.) v. General Electric Co.*, 193 N.Y. Misc. 146, 83 N.Y.S. 2d 768 (1948).

bringing an action on it almost anywhere,⁹⁹ in much the same manner as foreign judgments are enforced.¹⁰⁰ The award will be considered final and binding upon the issue—unless the state is one with a strong policy against enforcement. That is, if a court regards the agreement as completely void because against public policy—and several so regard future-disputes clauses—the award, foreign or domestic, will not be given any binding effect.¹⁰¹

It is readily apparent that state regulation of the labor-management agreement to arbitrate not only brings about the usual irregularities of interpretation and application (the same collective agreement means different things in different states), but places the element of enforceability literally beyond the control of the parties. Either party can frustrate the agreement with a fair degree of ease. If any sort of reliability is to be injected into the field of labor arbitration, some degree of uniformity or control must be achieved. An appropriate federal arbitration statute would solve many of the current ills, although certainly not all of them. And, further, if both state and federal courts could be persuaded to abandon the "procedural" label which has been affixed to the enforcement of agreements, the whole affair might become quite manageable. It is likely that the first achievement will come more readily than the second.

VII. FEDERAL ENFORCEMENT OF INDUSTRIAL ARBITRATION AGREEMENTS

The movement toward a federal industrial arbitration statute has been propelled in the federal courts, as in the state courts, by judicial discontent with the existing situation. Dissatisfaction with the present federal arbitration statute has been expressed through disagreement as to how that statute is to be applied, and whether or not the federal statute excludes contracts between employers and employees from its operative terms. Some of the federal courts of appeal have already applied the statute to arbitration clauses contained in collective agreements. The present Federal Arbitration Act is an outgrowth of the Draft State Act promulgated by the American Arbitration Association, and although it

⁹⁹ Compare *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924) where the cases are cited.

¹⁰⁰ See 2 Beale, *Conflict of Laws* 1249 (1935) and cases cited therein.

¹⁰¹ Compare *Shafer v. Metro-Goldwyn-Mayer Distributing Corp.*, 36 Ohio App. 31, 172 N.E. 689 (1929), refusing to enforce a foreign award; *Gilbert v. Burnstein*, 255 N.Y. 348, 174 N.E. 706 (1931), enforcing a foreign award.

differs in some important respects it is modeled closely upon the New York act. Fostered by maritime and commercial interests, the whole Act was drafted before any thought was given to the labor contract. Apparently as an afterthought the words of exclusion were appended to the first section of the Act.¹⁰² The first section of this statute does nothing more than define "maritime transactions" and "commerce," and ends with the proviso that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The second section makes valid and enforceable all arbitration agreements appearing in any maritime transaction or "contract evidencing a transaction involving commerce."

Section 3 of the Federal Act empowers the federal courts to stay court proceedings in any case where the issue involved is referable to arbitration under a written agreement. This section, set out in a footnote below,¹⁰³ is phrased very broadly and, on its face, appears applicable to any suit brought upon any issue referable to arbitration. There is a question, however, whether the exclusion in Section 1 applies throughout the act or merely delimits the definitions of "commerce" and "maritime transaction," neither of which terms is used in Section 3. In suits filed by employees under the Fair Labor Standards Act¹⁰⁴ to collect unpaid overtime wages from their employers, the federal courts have split upon the question as to whether the proceeding should be stayed pending arbitration as provided in the applicable collective bargaining contracts, or whether the suit should be entertained. The Court of Appeals for the Third Circuit has taken a broad view of Section 3 and a narrow view of Section 1. Finding that claims arising under the Fair Labor Standards Act were legal rights which may be arbitrated, Judge Goodrich in two cases¹⁰⁵ ordered the actions stayed until the arbitrations were held. This same court has maintained this view in later cases.¹⁰⁶

¹⁰² Judge Parker maintains that the exclusionary clause was added because "Congress was steering clear of compulsory arbitration of labor disputes. . . ." *Int'l Union United Furniture Workers v. Colonial Hardwood Floor Co.*, 168 F. 2d 33, 36 (C.C.A. 4th, 1948).

¹⁰³ Section 3 reads: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 61 Stat. 669 (1947), 9 U.S.C.A. § 3 (Supp. 1948).

¹⁰⁴ 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201-219 (1947).

¹⁰⁵ *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (C.C.A. 3d, 1943); *Watkins v. Hudson Coal Co.*, 151 F. 2d 311 (C.C.A. 3d, 1945).

¹⁰⁶ *Evans v. Hudson Coal Co.*, 165 F. 2d 970 (C.C.A. 3d, 1948).

The Sixth Circuit, however, only a year after the *Donahue* case, read the exclusionary clause to apply to the whole Act and refused to order a stay.¹⁰⁷ Early indications were that the Court of Appeals for the Fourth Circuit had joined Judge Goodrich,¹⁰⁸ but last year Judge Parker took an opportunity to clarify his court's position. This was in a suit brought by an employer against a labor union and its local under Sections 301 and 303¹⁰⁹ of the Taft-Hartley Act to recover damages arising from a strike.¹¹⁰ In refusing to order a stay, Judge Parker based the decision upon the fact that the arbitration clause in the collective bargaining contract had no relation to such claims of damage. He went on to say that the Federal Arbitration Act could not be applied to enforce such an arbitration agreement, adopting the view (and taking direct issue with Judge Goodrich) that the exception of contracts of employment in the first section applied to the whole Act.

There the situation lies. The Third Circuit is willing to make the labor arbitration agreement subject to the "stay" provisions of Section 3 of the Federal Arbitration Act. The Fourth and Sixth Circuits have lined up against this procedure. In the *Watkins* case, however, the Supreme Court denied certiorari,¹¹¹ possibly indicating agreement with the Third Circuit. In any case, the result is to further the legal confusion surrounding arbitration in this country. Of greater significance than this, perhaps, is the fact that the disagreement of the federal courts of appeal has made ambiguous those provisions of the Taft-Hartley law which touch the industrial arbitration agreement. Thus, whether an arbitration clause limits the ability of a party to sue under Section 301 of the Taft-Hartley Act,¹¹² which authorizes suits in the federal courts for violation of collective bargaining contracts, is a matter of doubt. At this writing no pronouncement upon this question has been made. Obviously, if Judge Parker's views are to prevail, the labor-management arbitration clause will command little respect in the federal courts. Under Judge Goodrich's view of the Federal Arbitration Act, however, it might still

¹⁰⁷ *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (C.C.A. 6th, 1944).

¹⁰⁸ Compare *Agostini Bros. Bldg. Corp. v. United States*, 142 F. 2d 854 (C.C.A. 4th, 1944), where Judge Parker held that the power of the court to grant a "stay" under Section 3 of the Arbitration Act was not limited by the provisions of Section 2 which make valid and enforceable only arbitration agreements "in any contract or maritime transaction or transaction involving commerce." [61 Stat. 672 (1947), 9 U.S.C.A. § 2 (Supp. 1948).]

¹⁰⁹ 61 Stat. 156, 29 U.S.C.A. § 185 (Supp. 1948).

¹¹⁰ *Int'l Union United Furniture Workers v. Colonial Hardwood Floor Co.*, 168 F. 2d 33, 36 (C.C.A. 4th, 1948).

¹¹¹ *Watkins v. Hudson Coal Co.*, 151 F. 2d 311 (C.C.A. 3d, 1945), cert. den. 327 U.S. 777 (1946).

¹¹² 61 Stat. 156, 29 U.S.C.A. § 185 (Supp. 1948).

be possible for one of the contracting parties to stay an action brought under Section 301 pending arbitration.

To make the labor-management arbitration agreement enforceable only by use of the "stay" provision of the Federal Arbitration Act is, at best, a half-hearted result which cannot prove of much value. The "stay" provision is certainly a necessary condition to the enforcement of arbitration agreements. But without the other two provisions for enforcement—that giving the court the power to compel arbitration by an order, and the collateral method of empowering the court to appoint arbitrators—the effect of this "stay" must be to prolong industrial strife rather than to shorten it. For neither party could compel the other to arbitrate or to choose arbitrators; and each would be foreclosed from suing on the cause in court. It is evident that if any effective action is to be taken to enforce industrial arbitration agreements it must be taken by Congress. If the enforceability of these agreements be a goal, a federal statute is the solution.

There are two methods of enforcing arbitration agreements through federal statutes which appear the most feasible. The first is to amend the existing Federal Arbitration Act to make the whole statute clearly applicable to contracts between employers and employees. The second method would be to add a section to the National Labor Relations Act which would make it an unfair labor practice for an employer or a labor union to fail to comply with an arbitrator's award, or refuse to comply with the terms of an arbitration clause set forth in a collective bargaining agreement.¹¹³

There are many advantages to be gained from amending the present federal arbitration statute. Not only is the statute well drawn, on the whole, but it has had the benefit of almost thirty years of judicial construction. At the present time the Act provides that arbitration agreements in a "contract evidencing a transaction involving commerce" as well as maritime contracts are valid and enforceable. This jurisdictional requirement would have to be changed to something like that of the National Labor Relations Act, so that agreements between employers and employees engaged in "industries affecting commerce" could be made valid and enforceable under the Federal Act. The constitutional difficulties formerly presented by such a clause have long been surmounted. Of course, the exclusionary clause in the first section would have to be stricken.

Aside from this, little change would be necessary. The Act is fairly

¹¹³ See Teller, *A Labor Policy for America*, c. 8, p. 171 et seq. (1945), where this suggestion was advanced.

general in its terms and, it is believed, capable of widespread application. Any arbitration agreement would be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." The Act is not confined to "justiciable disputes" and thus agreements as to "interests" would be arbitrable. Future-disputes clauses are expressly made irrevocable, thus making the Act of practical value in the field of labor relations. If the judicial development in those states having similar statutes is any indication, the federal courts would no doubt assume jurisdiction to determine whether a dispute was or was not arbitrable.¹¹⁴ The only formal requirement of the arbitration agreement is that it be in writing, although, of course, the agreement must fulfill the requirements of a valid contract.

Three methods of enforcement—taken from the original Draft State Act—are provided in the Federal Act: (1) direct enforcement of arbitration agreements by an order compelling arbitration; (2) indirect enforcement by an order staying any action brought in violation of an arbitration agreement; (3) collateral enforcement by an order appointing arbitrators empowered to proceed with arbitration. As a result of these enforcement provisions there need never be an "arbitration by default," or an *ex parte* hearing. The parties are free to stipulate any method they wish for selecting the arbitrator. There is no provision that the arbitrator must be sworn, and no mention is made of the arbitrator's oath at all. In the absence of any provision requiring the oath, the parties may be represented by "partial" arbitrators on arbitration boards, as so many of them apparently wish to be. Furthermore, the arbitrator is given the power to decide all questions of law and fact necessary to the settlement of the dispute. Indeed, any other provision would be completely impractical.¹¹⁵ If the arbitrator must refer questions of law to a court, or if a court is free to review his findings of fact and conclusions of law, arbitration will be deprived of many of its advantages. At any rate, in those jurisdictions where the arbitrators enjoy such power, the courts have not objected to its exercise.¹¹⁶

There is only one stipulation made in the federal statute regarding enforcement of awards. If the parties have agreed that the award shall be made a judgment of a specified court, a party may apply to that court

¹¹⁴ *Brampton Woollen Co. v. Local Union* 112, 61 A. 2d 796 (N.H., 1948); *Matter of Int'l Ass'n of Machinists, [etc.] v. Cutler-Hammer, Inc.*, 297 N.Y. 519, 74 N.E. 2d 464 (1947).

¹¹⁵ The Illinois labor arbitration statute provides that the arbitrator must submit all questions of law to a court. The statute is not used, for this and other reasons. Notes 54 and 56 *supra*.

¹¹⁶ Compare *In the Matter of General Electric Co. (United Electrical, Radio & Machine Workers of America, CIO)* 121 N.Y. L.J. 193 (1949); *Matter of S. A. Wenger & Co., Inc. v. Propper Silk Hosiery Mills, Inc.*, 239 N.Y. 199, 146 N.E. 203 (1924).

for confirmation of the award at any time within one year. Notice of such application must be served upon the adverse party. In light of the common-law doctrine that awards are enforceable if there has been no revocation of the agreement prior to the award, the present stipulation is apparently sufficient, although prudence might suggest that the binding validity of the award be made explicit. Adequate precautions against awards procured by improper means and procedures are included in the Federal Act,¹¹⁷ and provision is made for the modification or correction of an award,¹¹⁸ thus obviating the necessity of overturning the whole award where only a minor defect is present. The section which authorizes an order vacating an award where the arbitrator has improperly refused to postpone a hearing, has refused to hear pertinent and material evidence, or by other misbehavior has prejudiced the rights of any party, sets forth the only limitation upon the procedures which may be used. In general, it may be said that the requirement of "due process" is the only procedural limitation in the statute.

It is not likely that the broadening of the jurisdictional area of the statute would meet strong opposition from the commercial world. Indeed, the present jurisdictional requirement has been attacked as awkward and unduly restrictive.¹¹⁹ There is no reason why an arbitration agreement in a "contract evidencing a transaction in commerce" should be enforceable to the exclusion of any or all other types of contracts. It would be possible, of course, to keep the present jurisdictional requirements for commercial contracts, while appending the proposed requirement for labor-management contracts if this were desired.

¹¹⁷ The Federal Arbitration Act authorizes the district courts to vacate an award:

"(a) Where the award was procured by corruption, fraud, or undue means.

"(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

"(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

"(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

"(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." 61 Stat. 672 (1947), 9 U.S.C.A. § 10 (Supp. 1948).

¹¹⁸ Under the Federal Arbitration Act an award may be modified by the district courts:

"(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

"(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

"(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

"The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties." 61 Stat. 673 (1947), 9 U.S.C.A. § 11 (Supp. 1948).

¹¹⁹ See Teller, *A Labor Policy for America* 175 (1945).

There are some disadvantages in achieving a method of enforcement of arbitration agreements by amending the present Federal Act in this fashion, although on the whole that statute as it now stands is deficient more for what it does not say than for what it does say. Perhaps the provision in the present statute which the parties to an industrial dispute—particularly the unions—would find most objectionable is the clause empowering the court to appoint an arbitrator where the parties themselves have made no provision for selecting one. This is the collateral method of enforcement named in the Act. Such a provision runs counter to prevailing labor-management prejudices concerning arbitration. It is a fundamental departure from the salutary principles of industrial arbitration to let the court impose arbitrators upon the parties. A possible solution would be to enforce only those agreements in which the arbitrator is named or in which a method of choosing the arbitrator is provided. Another possible solution is that of requiring the parties to choose from a panel of arbitrators, drawn up by the Federal Mediation and Conciliation Service or by the American Arbitration Association. The difficulty, at best, is not great, since most arbitration agreements in collective bargaining contracts either name the arbitrator or provide a procedure whereby one shall be selected.

A more serious matter is the absence of anything in the Federal Act pertaining to the effect of the arbitration agreement, or of the award itself, upon the rights of individual union members. Nor is there any provision dealing with the type of authority, if any, a union member must give the union in order that he may be bound by the award, just as there is no provision enabling the individual member to enforce an award. Most of these questions have come up and have been answered in jurisdictions with similar statutes. It has been held in New York that an employee cannot sue upon a dispute covered by an arbitration clause in a collective agreement.¹²⁰ Under this view the individual employee is bound by the arbitration clause as well as by the award.¹²¹ The action the union takes to settle the dispute, pursuant to the collective agreement, binds the employee. A necessary corollary to this view is the rule allowing the individual employee to enforce the award, usually as a third party beneficiary.¹²² In those states where the view still exists that the

¹²⁰ Compare *Triboro Coach Corp. v. N.Y. State Labor Relations Board*, 22 N.Y.S. 2d 1013 (1940), *aff'd* 286 N.Y. 314, 36 N.E. 2d 315 (1941), motion for rearg. den. 287 N.Y. 647, 39 N.E. 2d 276 (1941); *Appeal of Devery*, 266 App. Div. 213, 41 N.Y.S. 2d 293 (1943); *Di Natale v. Cavallero*, 85 N.Y.S. 2d 424 (1948).

¹²¹ *Sperling v. Newtown Laundry Service*, 264 App. Div. 878, 35 N.Y.S. 2d 588 (1942); *Curti v. Union Eng. Corp.*, 12 B.N.A. Lab. Arb. 292 (N.Y. S. Ct., 1949).

¹²² *Curti v. Union Eng. Corp.*, 12 B.N.A. Lab. Arb. 292 (N.Y. S. Ct., 1949).

union member is the actual party to the collective contract—and the union his agent—the union member can enforce the agreement or the award directly.¹²³ The individual member is still bound by the arbitration clause. But there is room for serious doubt as to which way the federal courts would go in the absence of specific statutory provisions covering these matters.

While the state courts have had no difficulty about authorization by the union member to his union concerning the latter's right to represent him in his grievances and to carry his disputes to arbitration, the federal courts have been considerably troubled by this problem. It has faced them in cases involving the construction of the Railway Labor Act. The Railway Labor Act (the only federal statute specially designed for voluntary arbitration) provides that, when a controversy is submitted to arbitration by the parties to an agreement covered by the Act, the submission shall be binding upon those parties.¹²⁴ The Act also provides, however, that the individual employee has the right to confer with his employer concerning his individual working conditions.¹²⁵ In the *Burley* cases¹²⁶ the Supreme Court was confronted with the question of the type of authorization required before the union can bind the individual employee in an arbitration settlement under that Act. The union had arbitrated a grievance and an award had been handed down. Dissatisfied with the award, the aggrieved employees brought suit upon the dispute which involved back wages for alleged "starting time." The Supreme Court first indicated that specific authorization from the employee to the union to settle his particular grievance is required.¹²⁷ But on a rehearing

¹²³ Compare *Mencher v. B. & S. Abeles & Kahn*, 274 App. Div. 585, 590, 84 N.Y.S. 2d 718, 722 (1948) (citing cases); *In re I. Miller & Sons v. United Office & Professional Workers*, Local 16, CIO, 16 C.C.H. Lab. Cas. ¶ 65048 (1949).

¹²⁴ 48 Stat. 1197 (1934), 45 U.S.C.A. § 158 (1943).

¹²⁵ This section of the Act reads: "*Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time. . . ." 48 Stat. 1186 (1934), 45 U.S.C.A. § 152(4) (1943).

¹²⁶ *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945), on rehearing, 327 U.S. 661 (1946).

¹²⁷ *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945). The Court felt that this, together with the provision set forth in note 125 supra, § 3(r)(j) which provides that "parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect . . .," was conclusive indication that Congress had not meant to nullify "all preexisting rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit." *Ibid.*, at 734.

For a scholarly exposition of the legislative intent in the Railway Labor Act see Weyand, *Majority Rule in Collective Bargaining*, 45 Col. L. Rev. 556, 568 et seq. (1945). This article advances what is probably the best discussion and defense of the majority-rule principle extant.

of the case, the Court indicated that such authorization is virtually presumed.¹²⁸ Now the party wishing to overturn the settlement has the burden of disproving the authorization.

While the *Burley* cases involved the construction of the Railway Labor Act only, their influence has been broadened by the inclusion in the Taft-Hartley Act of that clause of the Railway Labor Act which saves to the individual employee the right to confer with his employer concerning his individual working conditions.¹²⁹ The result of the second *Burley* case, while an advance over the view the Court first adopted, still retains some of what Justice Frankfurter in his dissent in the first case termed "destructive individualism"¹³⁰ in the area of collective bargaining. It must be readily apparent that such an "independent right" to ignore arbitration procedures and to litigate disputes strikes at the very heart of the collective bargaining agreement and at the peaceful settlement of disputes by arbitration. Here again is evident the anomaly of requiring labor and management to reach agreements, without regard as to how those agreements are to be kept.

If the second suggested device for enforcing arbitration agreements is chosen—that of amending the National Labor Relations Act to make it an unfair labor practice for an employer or a labor union to fail to comply with an arbitrator's award or to refuse to do any act necessary to comply with the arbitration agreement—the same problems confronted in the first suggested method would arise concerning the effect and finality of the agreement and the award. As the National Labor Relations Act now stands, it would be next to useless to add a provision of this type, since employees are at present free under Section 9(a) to settle their own grievances in their own way. But if that part of the NLRA could be discarded, there would be a great deal to say for this method of enforcing arbitration agreements and awards. First of all, it would have the virtue of simplicity. The National Labor Relations Board, without doubt our most experienced tribunal where labor matters are concerned, would be the only body empowered to settle disputes

¹²⁸ *Elgin, J. & E. Ry. Co. v. Burley*, 327 U.S. 661 (1946). The rehearing was the result of a petition joined in by the railroads, unions (railroad as well as the national AFL and CIO) and interested government agencies. The effect of the first decision had been drastic. The machinery of the Railway Labor Act came to a halt, and railroad managements began to insist upon written powers of attorney in dealing with unions. An exhaustive analysis of the *Burley* decisions and their effect appears in Watt, *Organized Labor and the Taft-Hartley Act*, 7 *Lawyers Guild Rev.* 193, 206 et seq. (1947).

¹²⁹ 61 Stat. 140 (1947), 29 U.S.C.A. § 158(a) (Supp. 1948).

¹³⁰ *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 758 (1945).

over arbitration agreements and awards coming within the federal jurisdiction, except in situations falling under the Railway Labor Act. Under such a set-up, a greater degree of uniformity and predictability of decision would result. And since labor arbitration agreements are infrequently violated and awards are seldom ignored, it is not likely that such an additional task would add greatly to the work of the Board.

The disadvantages of putting matters into the hands of the NLRB stem principally from the practical difficulties that might arise if an arbitration statute were appended to the NLRA. To make the breach of an arbitration agreement an unfair labor practice would not alone solve the task of enforcing the agreement. Provisions for the appointment of arbitrators, a statement of the permissible grounds for setting aside or modifying awards and for enforcing awards, and the details of a method whereby the Board, or either party, could obtain a stay of any action brought in the courts on the arbitrable dispute, to enumerate some of the troublesome items, would virtually require that an entire arbitration statute be included within the NLRA. At the same time, careful draftsmanship would obviate most of these problems; and the increased prospects for uniformity, with the resulting greater stability of labor relations, would seem to counterbalance any of these disadvantages. In addition to that, organized labor would probably be far more amenable to putting their affairs into the hands of the Board than to entrusting them to the courts.

Of course, either method would be effective, and the one which most satisfies both parties should be adopted. Society's interest, on the whole, is in obtaining the peaceful settlement of industrial disputes. This interest is best served when the conditions attending the settlement of these disputes are satisfactory to both parties. The only limits to the creation of these satisfactory conditions are those beyond which general social interests will be adversely affected. The device of arbitration as a means of settling industrial disputes remains safely within these boundaries. Indeed, the real interests of society demand a greater general use of the arbitral process. As everyone now knows, the repercussions of strikes spread far beyond the immediate area of conflict; and their recurrence is capable of disrupting the whole social and economic fabric. If society is to find a cure—or at least a palliative—for these spastic disturbances, some method of settling industrial disputes must be found. Arbitration is the method that has been widely selected by the disputants themselves. And the only social interest that arbitration has ever been accused of having transgressed is that of the judiciary against being

"ousted of its jurisdiction." Such an alleged "interest" can no longer be taken seriously. Indeed, if *real* social interest were the sole consideration, purely aside from the interests of the immediate industrial disputants themselves, arbitration should be compulsory. Certainly the fact remains that other nations have reached this result.¹³¹

In this country, however, such a step is now politically impossible. Even if compulsory arbitration were generally imposed by legislation, the existing structure of labor relations as we now know it would crumble away. For our present social structure is not geared to absorb the frictions that would be generated by depriving labor and management of their recourse to economic self-help. Indeed, it is unlikely that such a step could be taken at all, unless drastic changes were made in our basic political system; and such changes are fortunately not likely to be made within the foreseeable future.

Meanwhile, the future of industrial peace lies in encouraging the disputants to arbitrate voluntarily. Surely it would not be going too far to require that arbitration be made the terminal point of every contract grievance procedure.¹³² For if general social interests are balanced against the individual interests involved in everyday grievances arising under collective agreements, it is safe to say that the possible danger to society resulting from the uncontrolled prosecution of such disputes is far beyond the benefit thereby gained by any individual. But perhaps we have not yet reached this stage of development. Arbitration, in spite of its war-given impetus, is still fairly novel in many industrial areas. We have as yet few competent arbitrators; and the specially-trained arbitrator is a rare individual indeed. Moreover, such a compulsive measure might actually result in expanding the areas of recourse to self-help, since the parties by contract might exclude certain disputes from their grievance procedures. Perhaps for a start it will be sufficient to expect organized labor and management to recognize their voluntary commitments to arbitrate and to ask organized society, through its laws, to support and encourage them to this end.

¹³¹ Australia and New Zealand are leading examples. See Williams, *The Compulsory Settlement of Contract Negotiation Labor Disputes*, 27 *Tex. L. Rev.* 587 (1949), for a discussion of the development of this method of settlement both here and abroad.

¹³² In effect this is the result reached by the Railway Labor Act. Under the Act either party may force the other to submit his grievance to arbitration. This stipulation was added by the 1934 amendment to the Act. As the Supreme Court has said, "The aim [of the amendment] was not to dispense with agreement. It was to add decision where agreement fails and thus to safeguard the public as well as private interests. . . ." *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 728 (1945).